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CITATIONS

744962—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1366

CASSIUS M. MCDONALD, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 53–54) is reported at 159 F. 2d 861. The opinion of the district court appears at R. 16–19.

JURISDICTION

The judgment of the circuit court of appeals was entered February 18, 1947 (R. 55). The petition for a writ of certiorari was filed May 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1940 petitioner was discharged from custody pursuant to an order of the district court in a habeas corpus proceeding. On appeal by the respondent, the order of the district court was reversed and thereafter petitioner resumed service of his sentence. The question presented is whether petitioner is entitled to credit on his sentence for the 511 days during which he was at large on bond while the appeal was pending.

STATEMENT

In January 1936, petitioner was convicted in the United States District Court for the District of Minnesota upon a charge of conspiracy, in violation of the Federal Kidnaping Act (18 U. S. C. 408a, 408c), and he was sentenced to imprisonment for fifteen years.[1] He commenced service of the sentence on February 1, 1936. (See R. 42–43.)

On June 6, 1940, the United States District Court for the District of Kansas entered an order (R. 43–44) granting petitioner's application for a writ of habeas corpus and discharging him from custody, provided that he furnish bond conditioned on his complying with the final judgment of the appellate court.[2] Petitioner

[1] The conviction was affirmed on appeal (*McDonald* v. *United States*, 89 F. 2d 128 (C. C. A. 8)), and this Court denied a petition for a writ of certiorari. 301 U. S. 697.

[2] The court held that petitioner had been deprived of the effective assistance of counsel and that the convicting court lacked venue.

furnished bond (R. 44–45), and he was released from the respondent's custody in compliance with the order of the district court.

On appeal by the respondent, the Circuit Court of Appeals for the Tenth Circuit reversed the order of the district court with instructions to that court to direct that petitioner be returned to the warden's custody. See *Hudspeth* v. *McDonald,* 120 F. 2d 962, certiorari denied, 314 U. S. 617. Accordingly, on October 30, 1941, petitioner resumed service of his sentence (see R. 45–46). Petitioner was out of prison a total of 511 days as a result of the order of the district court discharging him from custody (R. 26). His sentence would have been fully served, less good time credits, on February 26, 1946, instead of July 22, 1947, if there had been no interruption in the service of the sentence (R. 15, 26, 47).

On the basis of these facts, petitioner filed on May 23, 1946, a petition (R. 3–10), and on June 13, 1946, an amended petition (R. 10–11) for a writ of habeas corpus in the United States District Court for the District of Kansas alleging that his sentence had been fully served. Respondent filed a return (R. 12–15) and a hearing was had. On August 19, 1946, the district court entered an order discharging petitioner from respondent's custody on conditional release (R. 19–20). In a memorandum opinion (R. 16–19), the court held that even though petitioner had

not been in custody, he was entitled to credit on his sentence for the 511 days during which the earlier habeas corpus case was pending on appeal. Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, this order of the district court was reversed with instructions to the district court to discharge the writ and direct the return of petitioner to the custody of respondent (R. 53–54, 55).

ARGUMENT

Arguing that the requirement of a bond conditioned on his compliance with the judgment of the circuit court of appeals constituted a continuation of the original imprisonment, petitioner urges that he was in legal effect serving his prison sentence during the 511 days he was at liberty while the appeal was pending. The contention is not novel. A similar argument was urged in *Morgan* v. *Ward,* 248 Fed. 691, almost thirty years ago, and the Circuit Court of Appeals for the Eighth Circuit flatly rejected it with the reminder that "Imprisonment in the penitentiary is a reality. It cannot be taken by absent treatment." This Court denied a petition for a writ of certiorari (247 U. S. 521), and the contention enjoyed a deserved repose until petitioner resurrected it.

We think it plain that a judgment directing the imprisonment of a defendant for fifteen years means that he shall be imprisoned for that term,

less whatever credits he earns in prison.[3] The concept of imprisonment does not comprehend the situation of one who is set at liberty without restraint or condition other than that he shall abide by the final decision in his case. As the court below points out (R. 54), this is not a case like *White* v. *Pearlman*, 42 F. 2d 788 (C. C. A. 10), upon which the district court relied (see R. 17–18). Because of error, the prisoner in that case was "ejected" from prison over his objection that his term had not been fully served. When the error was discovered, the court, in effect, estopped the warden from asserting it, and the prisoner's term was treated as not having been interrupted by his undesired "ejection" from prison. Here, on the other hand, petitioner initiated the habeas corpus proceeding and obtained his release because the district court adopted his view of the law. To accept petitioner's argument would mean that when a

[3] Cf. Act of June 29, 1932, 47 Stat. 381, c. 310 (18 U. S. C. 709a) which provides:

"The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

prisoner who is serving his sentence is later released on bail pending final decision of his appeal, as in *Gibson* v. *United States,* 327 U. S. 769, he continues to serve his sentence although he is at liberty. There is nothing in the law and nothing in policy considerations which require so absurd a result.

In an analogous situation, it has been held that a prisoner who delays the commencement of his sentence while appellate proceedings are pending is not entitled to credit for the time he spends in jail pending decision of his appeal. *Dimmick* v. *Tompkins,* 194 U. S. 540; *Baker* v. *United States,* 139 F. 2d 721 (C. C. A. 8); *Baker* v. *Hunter,* 142 F. 2d 615 (C. C. A. 10), certiorari denied for mootness, 323 U. S. 740;[4] *DeMarois* v. *Hudspeth,* 99 F. 2d 274 (C. C. A. 10), certiorari denied, 305 U. S. 656. In dealing with the question whether a parole violator is entitled to credit on his sentence for the time he was on parole, a more difficult question than the one in this case, this Court has held that he is not entitled to such credit, pointing out that "mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." *Anderson* v. *Corall,* 263 U. S. 193, 196. Cf. *Zerbst* v. *Kidwell,* 304 U. S. 359.

[4] This Court had earlier denied a petition for certiorari filed in this case before judgment in the circuit court of appeals. See our brief in opposition in No. 700, O. T. 1943, 321 U. S. 789.

None of the decisions relied upon by petitioner (Pet. 6–7) as being in conflict with the decision below involved the question presented by this case, and none lays down principles of law which conflict with the principle applicable here.

CONCLUSION

A prison sentence is served by imprisonment or other restraint, such as parole. During the 511 days in question, petitioner was neither imprisoned nor subject to parole supervision. He was free of restraint and subject only to an obligation to obey the decision of the circuit court of appeals. Petitioner has not fully served his sentence, and the circuit court of appeals therefore properly reversed the order of the district court. We respectfully submit that the petition for a writ of certiorari should be denied.

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